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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

REPLY TO BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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This reply responds to the Government's brief in opposition to certiorari.

1. The Government does not dispute the vast importance of the principal issue of this case to American industry and labor. It admits that the issue is important to the United States in its trade negotiations with other nations. Brief, 7. Instead of concluding that the case warrants review by this Court, however, it urges the opposite—*viz.*, that the case is so important that it should *not* be reviewed for fear that the decision below might be reversed. *Id.* at 8.[1]

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[1] The Government also tells this Court that so long as the decision below remains subject to review and possible reversal, the Government's flexibility in a round of trade negotiations to be commenced (the end of which is nowhere in sight) would be im-

The Government's position would subvert our Constitutional system. Its plea to this Court is therefore alarming. When Congress amended the countervailing duty law in 1975, it took pains to assure that domestic industry would receive the protection of the countervailing duty law *during a period of contemplated international negotiations*. Not only did Congress impose time limits on the Secretary of the Treasury and make judicial review of negative countervailing duty determinations available on an expedited basis to American manufacturers, but it also strictly limited the Secretary's discretion to postpone countervailing duty actions and decisions during trade negotiations, and then only under a specific procedure which the Government does not invoke here. *See* 19 U.S.C. § 1303(d)(2) and (e) (Supp. V 1975) [Appendix D to the Petition, 118a-120a].[1]

The Government comes before this Court in defiant disregard of this Congressional plan and intent and asks that it not state what the law is on the ad-

paired. Brief, 8. Interestingly, such principal trade experts in the Congress as Senator Russell B. Long (Chairman, Senate Committee on Finance) and Representative Charles A. Vanik (Chairman, Subcommittee on Trade, House Committee on Ways and Means) have expressed the view that the United States' negotiating position would be improved by a judicial decision upholding petitioner's position. *See* Daily Report for Executives, No. 141, page J-2 (July 21, 1977); The Plain Dealer (Cleveland, Ohio), April 24, 1977, § 6, at 1, col. 3.

[1] In the House-passed trade bill, the Secretary of the Treasury was authorized to suspend the imposition of countervailing duties if he determined that such imposition would be likely to seriously jeopardize the satisfactory completion of certain international negotiations. H.R. 10710, 93d Cong., 1st Sess., § 331 (1973). The Senate (and ultimately the Congress) felt that such a proposal failed to protect sufficiently the needs of domestic industry. *See* S. Rep. No. 93-1298, 93d Cong., 2d Sess. 183-188 (1974).

mittedly important issue presented for decision. The Government, in effect, argues that the decision below is expedient and even if incorrect should not be disturbed. Clearly, that approach is offensive to our system of laws and should be rejected.

2. The Government urges that the decision below was correct and is supported by the legislative history of the 1897 countervailing duty law, administrative practice, Congressional ratification, and this Court's decision in *Downs* v. *United States*, 187 U.S. 496 (1903). However, the following should be noted:

(a) The "legislative history" upon which the Government relies is nothing but fragments of confused debate and comment, which petitioner demonstrated, at length, in its briefs in the Courts below, to be unsupportive of the Government's position. Indeed, the Government's argument on this point failed to commend itself to a single one of the eight judges of the Courts below.[1]

(b) In urging that the Treasury Department's practice of not countervailing "nonexcessive" tax remissions is reasonable and lawful (brief, 11, 5-7), the Government (1) unduly minimizes the trade distortive effect of tax remission on exports, which has been repeatedly acknowledged by the Executive Branch (*see* authorities cited in petition, 20), (2) misrepresents the petitioner's position by suggesting that peti-

[1] The Government's inference (brief, 11 n. 8) that the Customs Court did not study the legislative history of the 1897 Act is incorrect. Each of the three Customs Court judges considered the legislative history and found it not to support the Government. *See* Appendix A to the Petition, pages 9a-13a, 18a-21a, 39a-42a.

tioner does not contend that the Treasury's position is arbitrary or unreasonable or that the economic theory underlying that position is fallacious, (3) ignores the teachings of this Court in *Downs, supra, United States* v. *Passavant,* 169 U.S. 16 (1898), and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), and (4) incorrectly implies that the GATT [4] rule on countervailing duties is somehow binding on the United States, when in fact, as both Courts below recognized, and as the Government knows well, GATT does not control.[5] Appendix A to the Petition, 14a, 30a; Appendix C to the Petition, 76a n. 21.

(c) In urging that Congress (in 1975) ratified Treasury's practice (brief, 13), the Government ignores the reports of the key committee of each chamber of Congress stating that no such ratification was intended.[6] In saying that the only congressional objection to the 1950-52 proposed legislation which would have legitimatized Treasury's practice was occasioned by an "injury" requirement (brief, 13 n. 12), the Government ignores the testimony of Senator O'Mahoney to which petitioner called attention.[7]

(d) In its discussion of *Downs, supra,* the Government essentially chooses not to confront the numer-

[4] General Agreement on Tariffs and Trade.

[5] Not only has Congress never delegated any authority to the Executive Branch to amend the countervailing duty law, but when the United States acceded to GATT in 1947, it agreed to undertake the relevant part "to the fullest extent not inconsistent with existing legislation." *See* Appendix A to the Petition, 14a, 30a.

[6] *H.R. Rep. No. 93-571,* 93d Cong., 1st Sess. 69 (1973); *S. Rep. No. 93-1298,* 93d Cong., 2d Sess. 172 (1974).

[7] *See* petition, 14 n. 16.

ous authorities which petitioner cited (*see* petition, 9-11), and instead attempts to draw inferences, regarding the Court's teachings, from the amount of countervailing duties assessed, a point explicitly not in issue in the *Downs* case. *See Downs* v. *United States,* 113 Fed. 144, 146 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903).

3. The Government's summary treatment of the second question presented by petitioner [8] totally misses the point. *See* Government brief, 11-12 n. 9. While it is true that both parties argued that their respective positions were correct as a matter of law, the majority of the Court below agreed with neither party. Rather, the majority presumed that certain facts existed and, relying on that presumption, directed that summary judgment be awarded to the Government. Petitioner's argument that the Court below, in taking this action, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision has not been met.

[8] "Whether summary judgment may properly lie in favor of the Government when predicated on a presumption that the Secretary of the Treasury made some private and unrevealed determination that the economic result of the forgiveness of the Japanese Commodity Tax on exports to the United States was not the conferring of a benefit countervailable under section 303."

In sum, this case is of undisputed importance and the decision below is manifestly indefensible. The Government's brief in opposition really highlights the importance of this Court's granting certiorari.

Respectfully submitted,

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